

EX PARTE OR LATE FILED

From: "M Weiss" <mweiss@javanet.com>
 To: "William Kennard, FCC CHairman" <wkennard@fcc.gov>
 Date: Tue, Feb 16, 1999 3:55 AM
 Subject: Important article on Property Status of Airwaves

9/1/94

I feel it is important at this time for you to understand the errors of the Commission, and where the whole system has failed the Constitution and basic human rights. This article explains the matter in an irreducible, clear manner.

I agree with all but the "solution" portion of this article, which suggests that the airwaves be sold to the highest bidder. This contradicts the rest of the article, which is dead nuts on the money!

Mark

RECEIVED

MAR 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

THE

OBJECTIVIST

NEWSLETTER

Edited and Published by AYN RAND and NATHANIEL BRANDEN

VOL. 3 NO. 4 APRIL, 1964

CHECK YOUR PREMISES

By AYN

RAND

The Property Status of Airwaves

Any material element or resource which, in order to become of use or value to men, requires the application of human knowledge and effort, should be private property - by the right of those who apply the knowledge and effort.

This is particularly true of broadcasting frequencies or waves, because they are produced by human action and do not exist without it. What exists in nature is only the potential and the medium through which those waves must travel. (That medium is not air; in legal discussions it is often referred to by the mythical term of "ether" - to indicate some element in space, at present unidentified.) Without the broadcasting station which generates the waves, that "ether" - on our present level of knowledge -- is of no practical use or value to anyone.

Just as two trains cannot travel on the same section of track at the same time, so two broadcasts cannot use the same frequency at the same time in the same area without "jamming" each other. There is no difference in principle between the ownership of land and the ownership of airways. The only issue is the task of defining the application of property rights to this particular sphere. It is on this task that the American government has failed dismally, with incalculably disastrous consequences.

There is no essential difference between a broadcast and a concert: the former merely transmits sounds over a longer distance and requires more complex technical equipment. No one would venture to claim that a pianist may own his fingers and his piano, but the space inside the concert hall -- through which

No. of Copies rec'd 2
 List A B C D E

the sound waves he produces travel -- is "public property" and, therefore, he has no right to give a concert without a license from the government. Yet this is the absurdity foisted on our broadcasting industry.

The chief argument in support of the notion that broadcasting frequencies should be "public property" has been stated succinctly by Justice Frankfurter: "[Radio] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another."

The fallacy of this argument is obvious. The number of broadcasting frequencies is limited; so is the number of concert halls; so is the amount of oil or wheat or diamonds; so is the acreage of land on the surface of the globe. There is

no material element or value that exists in unlimited quantity. And if a "wish" to use a certain "facility" is the criterion of the right to use it, then the universe is simply not large enough to accommodate all those who harbor wishes for the unearned. .r,

It's the proper task of the government to protect individual rights and, as part of it, to formulate the laws by which these rights are to be implemented and adjudicated. It is the government's responsibility to define the application of individual rights to a given sphere of activity -to define (i.e., to identify), not to create, invent, donate or expropriate. The question of defining the application of property rights has arisen frequently, in the wake of major scientific discoveries or inventions, such as the question of oil rights, vertical space rights, etc. In most cases, the American government was guided by the proper principle: it sought to protect all the individual rights involved, not to abrogate them.

A notable example of the proper method of establishing private ownership from scratch, in a previously ownerless area, is the Homestead Act of 1862, by which the government opened the Western frontier for settlement and turned "public land" over to private owners. The government offered a 160-acres farm to any adult citizen who would settle on it and cultivate it for five years, after which it would become his property. Although that land was originally regarded, in law, as "public property," the method of its allocation, in fact, followed the proper principle (in fact, but not in explicit ideological intention). The citizens did not have to pay the government as if it were an owner; ownership began with them, and they earned it by the method which is the source and root of the concept of "property": by working on unused material resources, by turning a wilderness into a civilized settlement. Thus, the government, in this case, was acting not as the owner but as the custodian of ownerless resources who defines objectively impartial rules by which potential owners may acquire them.

This should have been the principle and pattern of the allocation of broadcasting frequencies.

As soon as it became apparent that radio broadcasting had opened a new realm of material resources which, in the absence of legal definitions, would become a wilderness of clashing individual claims, the government should have promulgated the equivalent of a Homestead Act of the airways - an act defining private property rights in the new realm, establishing the rule that the user of a radio frequency would own it after he had operated a station for a certain number of years, and allocating all frequencies by the rule of priority, i.e., "first come, first served."

Bear in mind that the development of commercial radio took many years of struggle and experimentation, and that the goldrush of the "wishers" did not start until the pioneers who had taken the risks of venturing into the unknown -- had built it into a bright promise of great commercial value. By what right, code or standard was anyone entitled to that value except the men who had created it?

If the government had adhered to the principle of private property rights, and the pioneers' ownership had been legally established, then a latecomer who wished to acquire a radio station would have had to buy it from one of the original owners (as is the case with every other type of property). The fact that the number of available frequencies was limited would have served, not to entrench the original owners, but

to threaten their hold, if they did not make the best economic use of their property (which is what free competition does to every other type of property). With a limited supply and a growing demand, competition would have driven the market value of a radio (and later, TV) station so high that only the most competent men could have afforded to buy it or to keep it; a man unable to make a profit, could not have long afforded to waste so valuable a property. Who, on a free market, determines the economic success or failure of an enterprise? The public (the public as a sum of individual producers, viewers and listeners, each making his own decisions -- not as a single, helpless, disembodied collective with a few bureaucrats posturing as the spokesmen of its will on earth).

Contrary to the "argument from scarcity," if you want to make a "limited" resource available to the whole people, make it private property and throw it on a free, open market.

The "argument from scarcity," incidentally, is outdated, even in its literal meaning: with the discovery of ultra-high frequencies, there are more broadcasting channels available today than prospective applicants willing to pioneer in their development. As usual, the "wishers" seek, not to create, but to take over the rewards and advantages created by others.

The history of the collectivization of radio and television demonstrates, in condensed form, in a kind of microcosm, the process and the causes of _ capitalism's destruction. It is an eloquent illustration of the fact that capitalism is perishing by the philosophical default of its alleged defenders.

Collectivists frequently cite the early years of radio as an example of the failure of free enterprise. In those years, when broadcasters had no property rights in radio, no legal protection or recourse, the airways were a chaotic no-man's land where anyone could use any frequency he pleased and jam anyone else. Some professional broadcasters tried to divide their frequencies by private agreements, which they could not enforce on others; nor could they fight the interference of stray, maliciously mischievous amateurs. This state of affairs was used, then and now, to urge and justify government control of radio.

This is an instance of capitalism taking the blame for the evils of its enemies.

The chaos of the airways was an example, not of free enterprise, but of anarchy. It was caused, not by private property rights, but by their absence. It demonstrated why capitalism is incompatible with anarchism, why men- do need a government and what is a government's proper function. What was needed was legality, not controls.

What was imposed was worse than controls: outright nationalization. By a gradual, uncontested process -- by ideological default -- it was taken for granted that the airways belong to "the people" and are "public property."

If you want to know the intellectual state of the time, I will ask you to guess the political ideology of the author of the following quotation:

"Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest in the same extent and upon the basis of the same general principles as our other public utilities."

No, this was not said by a business-hating collectivist eager to establish the supremacy of the "public interest" over "private gain"; it was not said by a socialist planner nor by a communist conspirator; it was said by Herbert Hoover, then Secretary of Commerce, in 1924.

It was Hoover who fought for government control of radio and, as Secretary of Commerce, made repeated attempts to extend government power beyond the limits set by the legislation of the time, attempts to attach detailed conditions to radio licenses, which he had no legal authority to do and which were repeatedly negated by the courts. It was Hoover's influence that was, largely responsible for that

tombstone of the radio (and the then unborn television) industry known as the Act of 1927, which established the Federal Radio Commission with all of its autocratic, discretionary, undefined and undefinable powers. (That Act -- with minor revisions and amendments, including the Act of 1934 that changed the Federal Radio Commission into the Federal Communications Commission -is still, in all essential respects, the basic legal document ruling the broadcasting industry today.)

"What we are doing," said F.C.C. Chairman Newton N. Minow in 1962, "did not begin with the New Frontier." He was right.

The Act of 1927 did not confine the government to the role of a traffic policeman of the air who protects the rights of broadcasters from technical interference (which is all that was needed and all that a government should properly do). It established service to the "public interest, convenience or necessity" as the criterion by which the Federal Radio Commission was to judge applicants for broadcasting licenses and accept or reject them. Since there is no such thing as the "public interest" (other than the sum of the individual interests of individual citizens), since that collectivist catch-phrase has never been and can never be defined, it amounted to a blank check on totalitarian power over the broadcasting industry, granted to whatever bureaucrats happened to be appointed to the Commission.

"The public interest" -that intellectual knife of collectivism's sacrificial guillotine which the operators of broadcasting stations have to test by placing their heads on the block every three years -was not raised over their heads by capitalism's enemies, but by their own leaders.

It was the so-called "conservatives" -- including some of the pioneers, some of the broadcasting industry's executives who, today, are complaining and protesting -- who ran to the government for regulations and controls, who cheered the notion of "public property" and service to the "public interest," and thus planted the seeds of which Mr. Minow and Mr. Henry are merely the logical, consistent flowers. The broadcasting industry was enslaved with the sanction of the victims -- but they were not fully innocent victims.

Many businessmen, of the "mixed economy" persuasion, resent the actual nature of capitalism; they believe that it is safer to hold a position, not by right, but by favor; they dread the competition of a free market and they feel that a bureaucrat's friendship is much easier to win. Pull, not merit, is their form of "social security." They believe that they will always succeed at courting, pressuring or bribing a bureaucrat, who is "a good fellow" they can "get along with" and who will protect them from that merciless stranger: the abler competitor.

Consider the special privileges to be found in the status of a certified servant of the "public interest" and a licensed user of "public property." Not only does it place a man outside the reach of economic competition, but it also spares him the responsibility and the costs entailed in private property. It grants him gratuitously the use of a broadcasting frequency for which he would have had to pay an enormous price on a free market and would not have been able to keep for long, if he sent forth through the "ether" the kind of unconscionable trash he is sending forth today.

Such are the vested interests made possible by the doctrine of the "public interest" -- and such are the beneficiaries of any form, version or degree of the doctrine of "public property."

Now observe the practical demonstration of the fact that without property rights, no other rights are possible. If censorship and the suppression of free speech ever get established in this country, they will have originated in radio and television.

The Act of 1927 granted to a government Commission total power over the professional fate of broadcasters, with the "public interest" as the criterion of judgment -- and, simultaneously, forbade the Commission to censor radio programs. From the start, and progressively louder through the years, many voices have been pointing out that this is a contradiction impossible -to practice. If a commissioner has to judge which applicant for a broadcasting license will best serve the "public interest," how can he judge it without judging the content, nature and Value of the programs the applicants have offered or will offer?

If capitalism had had any proper intellectual defenders, it is, they who should have been loudest in opposing a contradiction of that kind. But such was not the case: it was the statist who seized upon it, not in defense of free speech, but in support of the Commission's "right" to censor programs. And, so long as the criterion of the "public interest" stood unchallenged, logic was on the side of the statist.

The result was what it had to be (illustrating once more the power of basic principles): by gradual, unobtrusive, progressively accelerating steps, the Commission enlarged its control over the content of radio and television programs leading up to the open threats and ultimatums of Mr. Minow, who merely made explicit what had been known implicitly for many years. No, the Commission did not censor specific programs: it merely took cognizance of program content at license-renewal time. What was established was worse than open censorship (which could be knocked out in a court of law): it was the unprovable, intangible, insidious censorship-by-displeasure -- the usual, and only, result of any nonobjective legislation.

(See my articles "Have Gun, Will Nudge" and "Vast Quicksands" in the March 1962 and July 1963 issues of this NEWSLETTER. For a graphic report on the present state of the television industry, see "TV: The Timid Giant" and "Why the Timid Giant Treads Softly," both by Edith Efron, in the May 18 and August 10, 1963 issues of TV Guide.)

All media of communication influence one another. It is impossible to compute the extent to which the gray, docile, fear-ridden, appeasement-minded mediocrity of so powerful a medium as television has contributed to the demoralization of our culture.

Nor can the freedom of one medium of communication be destroyed without affecting all the others. When censorship of radio and television becomes fully accepted, as a fait accompli, it will not be long before all the other media books, magazines, newspapers, lectures -- follow suit, unobtrusively, unofficially and by the same method: overtly, in the name of the "public interest"; covertly, for fear of government reprisals. (This process is taking place already.)

So much for the relationship of "human" rights to property rights.

Since "public property" is a collectivist fiction, since the public as a whole can neither use nor dispose of its "property," that "Property" will always be taken over by some political "elite," by a small clique which will then rule the public -- a public of literal, dispossessed proletarians.

If you want to gauge a collectivist theory's distance from reality, ask yourself: by what inconceivable standard can it be claimed that the broadcasting airways are the property of some illiterate share-cropper who will never be able to grasp the concept of electronics, or of some hillbilly whose engineering capacity is not quite sufficient to cope with a corn-liquor still -- and that broadcasting, the product of an incalculable amount of scientific genius, is to be ruled by the will of such owners?

Remember that this literally is the alleged principle at the base of the entire legal structure of our broadcasting industry.

There is only one solution to this problem, and it has to start at the base; nothing less will do. The airways should be turned over to private ownership. The only way to do it now is to sell radio and television frequencies to the highest bidders (by an objectively defined, open, impartial process) -- and thus put an end to the gruesome fiction of "public property."

Such a reform cannot be accomplished overnight; it will take a long struggle; but that is the ultimate goal which the advocates of capitalism should bear in mind. That is the only way to correct the disastrous, atavistic error made by capitalism's alleged defenders.

I say "atavistic," because it took hundreds of centuries before primitive, nomadic tribes of savages reached the concept of private property -- specifically, land property, which marked the beginning of

civilization. It is a tragic irony that in the presence of a new realm opened by a gigantic achievement of science, our political and intellectual leaders reverted to the mentality of primitive nomads and, unable to conceive of property rights, declared the new realm to be a tribal hunting ground.

The breach between man's scientific achievements and his ideological development is growing wider every day. It is time to realize that men cannot keep this up much longer if they continue to retrogress to ideological savagery with every step of scientific progress.